have waived any right to reverse on appeal where the evidence is not in writing—no matter how flagrant the abuse may have been in the trial court upon the admission or rejection of evidence, or in determining the weight thereof. However as a matter of practice, in any case involving a considerable sum, the evidence is usually reduced to writing, and so an appeal might be taken on it on the ground that the findings were against the weight of the evidence; while in cases involving only small amounts, courts will not as a rule grant new trials in any event, *"de minimis non curat lex," Buddington* v. *Knowles,* 30 Conn. 26; *Hyatt* v. *Wood,* 3 Johns. 239; *York* v. *Stiles,* 21 R. I. 225. W. W. M.

THE RIGHT OF CHANGE OF VENUE ON MOTION BY THE STATE.—The right of the prosecution in a criminal action to move for a change of venue presented itself in the recent case of *Glinnan et al.* v. *Phelan, Judge* (Mich. 1913), 140 N. W. 87. The court in order to reach its conclusion virtually overruled its former holdings on two points, namely, the right of the state to move for a change of venue and the remedy for erroneously ruling in such matters. Glinnan and nine other aldermen of the City of Detroit were charged with the crime of bribery, and after a plea of not guilty was entered the prosecuting attorney for Wayne county presented affidavits to the effect that the state could not secure a fair and impartial jury and asked for a change of venue to some other county, which was granted over the relators' objections. The relators sought a writ of mandamus in the supreme court requiring the trial court to vacate its order and to proceed with the trial. By a vote of four to three, the court granted the writ. The point upon which the majority agreed was that the state cannot be granted a motion for a change of venue over the accused's objections without there first being an effort to obtain a jury, and that such error was subject to review by mandamus. Two of the judges were in favor of completely overruling the cases of *People* v. *Peterson,* 93 Mich. 27, and *People* v. *Fuhrman,* 103 Mich. 593 holding the state can move for a change of venue, while the other two judges reconciled the cases on the ground that an effort had been made to obtain juries in the earlier cases. But all agreed that the case of *Lyle* v. *Circuit Judge,* 157 Mich. 33, which held that any alleged error in a ruling on a change of venue was subject to review only on appeal by writ of error, should be so modified as to permit a review by mandamus. The three dissenting judges were satisfied that the cases of *People* v. *Peterson* and *Lyle* v. *Circuit Judge, supra,* were the settled law for Michigan.

Whether the right to a change of venue is a common law right or purely statutory, is a question upon which there is irreconcilable conflict. In the recent case of *Crocker et al* v. *Justice of Superior Court* (1911) 208 Mass. 162, 94 N. E. 369, 21 Ann. Cases 1061, the court, after a very exhaustive review of the American and English cases, said, "The great weight of authority supports the view that it is an inherent power of the common law to order the change for purposes of securing a fair trial." And the case of *Reg.* v. *Conway,* 9 Ir. C. L. 507, held, "there is another common law right equally open to the defendant and prosecutor, that when it appears that either

party can not obtain a fair and impartial trial, the court has jurisdiction to change the case to an indifferent county." But whether it is a common law right or not, most of the states have secured that privilege by a statute or a constitutional provision, *Cooke* v. *Cooke,* 41 Md., 362. And the court in *People* v. *Peterson, supra,* held the Michigan statute providing "The Courts upon good cause shown may change the venue in any cause presented," was merely declaratory of the common law. That the prosecution in the absence of an expressed right can move for a change of venue has been held in *People* v. *Webb,* 1 Hill (New York) 179; *People* v. *Baker,* 3 Park Cr. (N. Y.) 181; *People* v. *Vermilyea,* 7 Cowan, 139.

Where the constitution merely provides for an impartial trial, without express provision as to the place of trial, there seems no reason why the state's motion for a change of venue should not be entertained. "The right guaranteed to the accussed to be tried in the county where the crime is alleged to have been committed, is a qualified right subject to and conditioned upon the possibility that a fair and impartial trial can be had in that county. The effect of the language of the statute is to confer the right to change venue equally upon the state and the defendant." *State, ex rel. Hornback* v. *Durflinger,* 73 Oh. St., 154, 76 N. E. 391. A fair and impartial trial applies to the rights of the state as well as to that of the accused. *Barry* v. *Truax,* 13 N. D. 131, 99 N. W. 796, 112 Am. St. Rep. 662. "While the right is expressly given to the accused to a trial by a jury of the vicinage, yet the commonwealth reserves the power to enforce its laws and if it should become essential to their enforcement that the commonwealth should take a change of venue the same shall be done." *Commonwealth* v. *Davidson,* 91 Ky. 162, 19 S. W. 53. The court in *Cox* v. *State,* 8 Tex. App. 254, commented "We can not imagine a state of case in which a trial at law at any event could be said to be fair and impartial when it is so only to one party, and directly opposite to the other. From a legal standpoint, the proposition is worse than paradoxical—it amounts to absurdity". And when there are influences which would prevent a fair trial to the state, the court should grant a change of venue. *Gregory* v. *State,* (Tex. Cr. App.) 37 S. W. 752. Whether the state shall be granted such a motion is solely within the discretion of the court. *Republic of Hawaii* v. *Hickey,* 11 Haw. 314.

There is another line of cases, under constitutional provisions that provide not only for an impartial trial, but that it shall be held in the county or district where the offense is committed. These have uniformly held that statutes conferring upon the state a right to move for a change of venue are unconstitutional. "The provision (trial in the county of the crime) in the constitution is simply declaratory of the common law right of trial by jury. Until the accused shall have been tried by an impartial jury in his own county, or shall have waived his right by consenting to a change of venue, he can not be lawfully convicted". *In re Nelson* 19 S. D. 214, 102 N. W. 885. The purpose of the clause is that the accused may have the benefit of his own good character and standing with his neighbors and also such knowledge as the jury may possess of the witnesses who gave evidence before them. *Olive* v. *State,* 11 Neb. 1. It seems to be the uniform rule that under such

a constitutional provision the defendant is entitled absolutely to trial at the place of the alleged crime, and any statute defeating this right of the accused is void. *State* v. *Kindig,* 55 Kan. 113, 39 Pac. 1028; *Wheeler* v. *State,* 24 Wis. 52; *People* v. *Powell,* 87 Calif. 348, 11 L. R. A. 75; *Kirk* v. *State,* 1 Cold. (Tenn.) 344; *Ex parte Rivers,* 40 Ala. 712; *Miller* v. *People,* 230 Ill. 65, 82 N. E. 521. The state can under no circumstances remove the case on its own motion. *State* v. *Greer,* 22 W. Va. 800. "In those states whose constitutions confer on the defendant the right to be tried in the county of the crime, plainly, as only his waiver can justify change of venue, there can be none on application from the prosecuting power. But where there is no constitutional impediment, the English rule permitting the prosecutor as well as the defendant to be the applicant, may well prevail also with us." 1 BISHOP CRIMINAL PROC. § 75a. Manifestly and with reason there is a clear distinction between constitutions providing merely for an impartial trial and those providing for an impartial trial at the place of the crime. The Michigan constitution is of the first class, and accordingly the rule laid down in the *Peterson* case is in full accord with the authority. It would seem that any attempt to overrule that case would tend to divert from the accepted channel of decisions.

But the principal case holds that no change of venue shall be granted on the state's motion *until an effort has been made to obtain a jury.* The statute leaves the matter to the discretion of the trial judge, and the attempted restriction seems hardly in spirit with the law. An effort to obtain a jury should be but one of the elements open to the trial court to resort to, if necessary, to determine whether a change of venue should be granted or not; and if there is other satisfactory proof that a fair trial can not be had, that should suffice, without going to the trouble and expense of attempting to get a jury. The rule laid down in the principal case would often lead to an absurdity, and to unnecessary delay. The mere fact that a jury can be obtained does not necessarily mean that a fair trial can be held. The court in *Territory* v. *Manton,* 8 Mont. 95, said, "We remark, however, that we do not think that the fact that a jury can be obtained in a county is at all conclusive that a fair and impartial trial can be had in such a county." While it is not error to overrule a motion for a change of venue until an attempt is made to get a jury, *State* v. *Gray,* 11 Nev. 212; *People* v. *Staples,* 149 Calif. 405, 86 Pac. 886; yet in *People* v. *Long Island Railroad,* 4 Park Cr. (N. Y.) 602, where the precise question was considered, the court held that it was not indispensable to a change of venue in a criminal case that there should be an ineffectual attempt to obtain a jury in a county where the venue is laid. It is a matter for the discretion of the trial court and attempts to secure a jury would often lead to an idle expenditure of state funds. *Sims* v. *State,* (Tex. Cr. App.), 36 S. W. 256. And it is necessary to experiment in attempting to impanel a jury *People* v. *Webb, supra.*. In *Hunter* v. *State,* 43 Ga. 483, 520, the court commented, "While we do not lay it down as a legal rule that the judge should first try to obtain a jury by the ordinary process of court, before changing the venue, still we are of the opinion that, perhaps, this is the most satisfactory test." And in *O'Berry* v. *State,*

47 Fla. 75, 36 South, 440, it was held that the better practice would be to put the matter to an active test by attempting to secure a jury, and not merely to rely on affadavit. But no authority goes so far as to say that an effort to obtain a jury is indispensable to granting the motion. The right to a change of venue is a question of fact, and the trial judge is in the best position to determine the right of the movant, being at the seat of action.

But if there is an alleged erroneous ruling by the trial court, on a motion for a change of venue, what should be the remedy? It has been generally held that a right to a change of venue lies wholly within the discretion of the court. "Whether a change of venue shall be granted in a criminal case, rests within the discretion of the court, and its action will not be disturbed unless it appears that such discretion was abused." *Andrews* v. *People,* 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; *State* v. *Towney,* 81 Kans. 162, 105 Pac. 218; *State* v. *Perigo,* 70 Iowa 656; *Maxey* v. *State,* 76 Ark. 276. And in *State* v. *Foster,* 91 Iowa 164, 59 N. W. 8, on an appeal from a ruling of the trial court, it was said, "while upon the facts we might have decided differently, yet we can not say that the district court abused its discretion, in determining upon the evidence against the defendant's application for a change of venue." The court in *Crockett* v. *Commonwealth,* 100 Ky. 382, 38 S. W. 678, stated that "the trial court has a better opportunity of properly estimating the credibility of the witness and the weight of evidence than this court, on motion for a change of venue, and while we have a right to revise or reverse its judgment on such a motion, it is not nor ought to be done, except when we are satisfied that discretion is abused." The current authority both of England and America is that *mandamus* will not lie to control the exercise of discretion of inferior courts. "The granting or refusing of applications for a change of venue may be appropriately referred to the same rule, and the discretion of the court over applications of this motion is not subject to control by *mandamus*". HIGH EXTR, LEGAL REMEDIES, (3rd Ed.) §§ 156, 172. In conformity with these views the court in *Lyle* v. *Circuit, supra,* after an extended discussion of the authorities, held that the remedy for any alleged error in passing upon a motion of venue was by writ of error and not by *mandamus.* It was held in *People* v. *Sexton,* 24 Calif. 78, that although affadavits upon which the change of venue is made may not show a legal cause for a change, still if the court grants the application, it has acted judicially, and upon a matter within its cognizance, and the remedy, if an injury is sustained, is by appeal from the final judgment and not by *mandamus.* And where there is an alleged error in granting change of venue to one county rather than another, it can not be corrected by *mandamus,* since it may be reviewed and corrected upon appeal from final judgment. *State* v. *Superior Court* (Wash. 1912), 117 Pac. 1107. Apparently the only logical ground, if there is any, for granting a writ of mandamus in the principal case must be based upon the fact that it was a gross abuse of the court's discretion in not attempting to secure a jury before granting the motion, or that the relief afforded by writ of error is inadequate and ineffectual to prevent an irreparable injury. *Mandamus* serves to some extent in the place of writ of error where a party without

its aid would suffer irreparable injury. *Ex parte Bryan,* 44 Ala. 402. But what would be an irreparable injury is a question for each case and can hardly be fixed by definite rule. S. H. M.

CROSS-REMAINDERS ARISING FROM DEVISE TO TWO "DURING THEIR LIVES."—The Supreme Court of Mississippi has recently passed upon an interesting question as to the effect of the terms "during their lives," and "at their death" in a devise. A testatrix devised certain real estate to "J. C. and L. C. for and during their natural lives and at their death to go to the heirs of their bodies." By codicil it was directed that "in the event of a failure of issue by the said L. C. and J. C. that on their death all property bequeathed to them" should go to certain nephews. J. C. died under age and unmarried. The nephews, ultimate remainder-men, claimed the share of J. C. by virtue of the remainder limited to them, but the court held that the nephews were entitled to nothing until the death of both J. C. and L. C. without issue, and that L. C. succeeded to all the rights of J. C. by virtue of an implied cross-remainder. *Henry* v. *Henderson,* 60 So. 33.

Cross-remainders are defined as "remainders limited after particular estates to two or more persons, in several parcels of land, or in several undivided shares in the same parcel of land, in such way that on the determination of the particular estates in any of the several parcels or undivided shares, they remain over to the other grantees (or devisees) and the reversioner or ulterior remainder-man is not let in until the determination of all the particular estates." 1 PRESTON, ESTATES 94. Such remainders are never implied in deeds but may be so in wills. This theory of cross-remainders may become applicable in any one of three general situations. UNDERHILL, WILLS, 1281-1284. THEOBALD gives eight, but they are merely variations of these three. THEOBALD, WILLS, 571.

The first general situation embraces those cases in which an estate is given in fee tail to two or more as tenants in common, and is limited over in remainder on the death of either, both, or all, without issue, as the case may be. The theory originated with this class of cases at common law. The reason for the application was that, unless a cross-remainder could be implied, on the death of any one of the tenants in tail without issue, an intestacy would result as to his share from the time of his death down to the death of the last survivor without issue. UNDERHILL, WILLS, 1281. To prevent this possibility cross-remainders between the tenants in tail were implied. *Holmes* v. *Meynel,* 25 Eng. R. Cas. 697; *Hannaford* v. *Hannaford,* L. R. 7, Q. B. 116; *Wright* v. *Holford,* 1 Cowp. 31; *Phipard* v. *Mansfield,* 2 Cowp. 797; *Watson* v. *Foxon,* 2 East 36; *Powell* v. *Howells,* L. R. 3 Q. B. 653; *Doe* v. *Webb,* 25 Eng. R. Cas. 702; *Halsey* v. *Gee,* 79 Miss. 193; *Banking Co.* v. *Field,* 84 Miss. 646.

The second general situation arises in cases in which an absolute devise is made, either of a fee in land or of personal property, to two or more as tenants in common, with a limitation over on the sole condition that all die without issue. The English rule in such cases is *not* to imply cross-remainders. *Skey* v. *Barnes,* 3 Meriv. 334; *Baxter* v. *Losh,* 14 Beav. 612. UN-